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No. 04-1244

In the

Supreme Court of the United States

JOSEPH SCHEIDLER, et al.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

1. Does the Seventh Circuit's defiance of this Court's mandate merit summary reversal?

2. Did the Seventh Circuit err by ruling, in conflict with the Ninth Circuit, and in conflict with the official position of the Department of Justice, that private civil litigants may obtain injunctive relief under the federal Racketeer Influenced and Corrupt Organizations (RICO) statute?

3. Did the Seventh Circuit err by ruling, in conflict with the Sixth and Ninth Circuits, and in conflict with the official position of the Department of Justice, that the federal Hobbs Act, 18 U.S.C. § 1951, may plausibly be construed to prohibit, without any connection to robbery or extortion, any act or threat of "physical violence to any person or property" that "in any way or degree . . . affects commerce"?

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) submits this brief amicus curiae in support of neither party on the merits according to Supreme Court Rule 37.[1] Petitioners and Respondents have granted written consent for all Amicus Curiae, which has been lodged with the clerk of this Court. Founded in 1973, Pacific Legal Foundation litigates cases affecting the public interest in state and federal courts nationwide. In these cases, PLF seeks to protect individual liberty by advocating that government power must be constrained by the strict limits of the Constitution and enabling statutes.

In this case, the Seventh Circuit has interpreted the Hobbs Act to authorize federal jurisdiction over virtually every violent act in the United States. Such continued erosion of the limits on federal power undercuts individual liberty. This Court must now decide whether that interpretation is consistent with statutory or constitutional limits. That is a question of substantial public interest. PLF has participated in numerous cases before this Court concerning the proper scope of the federal government's enumerated powers, including, *Gonzales v. Raich*, 125 S. Ct. 2195 (2005); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*); *United States v. Morrison*, 529 U.S. 598 (2000); *Reno v. Condon*, 528 U.S. 141 (2000); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); and *United States v. Lopez*, 514 U.S. 549 (1995).

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[1] Pacific Legal Foundation hereby affirms that counsel for any party did not author any part of this brief, nor did any person or entity make a monetary contribution for the purpose of preparing or submitting this brief. Sup. Ct. R. 37.6.

INTRODUCTION

At the end of the Twentieth Century, there were more than 3,600 federal crimes on the books, most of which duplicated offenses long prosecuted under state law. Susan A. Ehrlich, *The Increasing Federalization of Crime*, 32 Ariz. St. L.J. 825, 826; 837-42 (2000). In 2003, the number of criminal cases filed in federal court had risen to 70,642, "surpassing the previous record reported in 1932, the year before the Prohibition Amendment was repealed." Chief Justice William H. Rehnquist, Supreme Court of the United States, 2003 Year-End Report on the Federal Judiciary (2004), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2003 year-endreport.html. This number shows no signs of diminishing. Chief Justice William H. Rehnquist, Supreme Court of the United States, 2004 Year-End Report on the Federal Judiciary (2005), *available at* http://www.supreme courtus.gov/publicinfo/year-end/2004year-endreport.pdf.

As federal legislation increasingly resembles general police power regulations, the power of states to regulate the everyday affairs of their citizens diminishes. Ehrlich, *supra*, at 837-38. Thus, federalism, the dual-sovereignty established by the Constitution, and necessary to preserve individual freedom, is diminished. Lynn N. Hughes, *Don't Make a Federal Case Out of It: The Constitution and the Nationalization of Crime*, 25 Am. J. Crim. L. 151, 158-59 (1997). *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."); *Lopez*, 514 U.S. 549 (finding the Constitution requires definite limits on federal power). As federal power expands, state governments are gradually becoming no more than provincial stewards, reduced to carrying out the federal government's orders and policies. Ehrlich, *supra*, at 838-42. In addition, federalization of crime trivializes criminal law and

weakens respect for all laws due to nonenforcement and selective enforcement. Hughes, *supra*, at 160.

If the limits on federal power established by the Constitution "are to have any real meaning, Congress must be prevented not only from formally destroying states but also from acting in ways that would leave a state formally intact but functionally a gutted shell." 1 Laurence H. Tribe, *American Constitutional Law* 865 (3d ed. 2000). It is the duty of the federal courts to interpret the law consistent with the Constitution's limits on government power and its central purpose of preserving individual freedom. U.S. Const. pmbl.; *Marbury v. Madison*, 5 U.S. 137, 176-78 (1803). In considering the interpretation of the Hobbs Act expounded by the court below, this Court should have firmly in mind its recent Commerce Clause precedents and the fundamental rationale underlying those precedents: that the Constitution limited federal power to that enumerated—the regulation of commerce "among the several states." U.S. Const. art. I, § 8, cl. 3.

SUMMARY OF ARGUMENT

Given Congress' penchant for federalizing every crime it can, this Court needs to continue to define limits on Congress' authority under the Commerce Clause. Whatever the Court decides with respect to the Seventh Circuit's interpretation of the Hobbs Act and its applicability to acts or threats of violence against persons or property independent of robbery or extortion, any decision should reflect the constitutional "first principles" inherent in the fact that there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 617.

ARGUMENT

I

THE MODERN "SUBSTANTIAL EFFECTS" TEST PLACES STRICT LIMITS ON FEDERAL POWER OVER INTRASTATE ACTIVITY

Crime is inherently intrastate activity, so federal control of any particular species of crime under the Commerce Clause must rely on this Court's test for when Congress can constitutionally control activities having a substantial relation to interstate commerce. The modern substantial effects test derives from three noteworthy cases that ushered in an expansive application of the commerce power, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *United States v. Darby*, 312 U.S. 657 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942). These cases established the outer limits of Congress' authority to regulate under the Commerce Clause.

In *Jones & Laughlin Steel*, the Jones & Laughlin Steel Corporation was charged with unfair labor practices under the National Labor Relations Act when the corporation apparently discharged 12 employees from its Aliquippa, Pennsylvania, plant because they had joined the union and assisted in collective bargaining activities. *In re Jones & Laughlin Steel Corp.*, 1 N.L.R.B. 503, 503-04, *enforcement denied*, *NLRB v. Jones & Laughlin Steel Corp.*, 83 F.2d 998 (5th Cir.), *cert. granted*, 299 U.S. 534 (1936), and *rev'd*, 301 U.S. 1 (1937).

As a defense, Jones & Laughlin Steel argued that the Act was constitutionally infirm because it did not regulate interstate commerce but was a gambit aimed at subjecting all industrial labor relations to federal control without regard to the effects on interstate commerce. *See Jones & Laughlin Steel*, 301 U.S. at 29.

To determine the object of the Act, this Court looked to the statutory language itself and observed that the Act empowered the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." *Id.* at 30. The Act, in turn, defined "commerce" in the traditional sense to mean "trade, traffic, commerce, transportation, or communication among the several states." *Id.* at 31.[2] The Act went further and also defined the term "affecting commerce."

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Id.

Because the National Labor Relations Act explicitly limited the Board's jurisdiction to only those labor practices actually "affecting commerce," this Court found the Act was a valid Commerce Clause enactment. By "its terms," this Court noted, the Act does "not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce." *Id.* Rather, this Court found, "[i]t purports to reach only what may be deemed to burden or obstruct that

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[2] *See generally* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. Chi. L. Rev. 101 (2001) (chronicling examples of the uniform use of the word "commerce" to mean only trade or exchange in founding era dictionaries, constitutional convention speeches, the Federalist papers, and state ratification conventions); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 Ark. L. Rev. 847, 858 (2003) (analyzing 1600 appearances of the word "commerce" in the *Pennsylvania Gazette* from 1728-1800 and concluding the word was "routinely used to refer to trade or exchange, including shipping" and routinely distinguished from agriculture and manufacturing).

commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds." *Id.*

The significance of this analysis, as would later become clear in *Lopez* and *Morrison*, lies in this Court's search for a jurisdictional element tying the regulated intrastate activity to impacts affecting commerce (so as to limit the scope of the Act to the delegated authority) and this Court's reliance on the terms of the Act itself; on what the Act expressly purports to regulate.

After upholding the Act facially, this Court considered whether the regulated activity was within constitutional bounds as applied in that particular case; that is, whether the unjustified firing of employees would affect (i.e., burden or obstruct) interstate commerce. *Jones & Laughlin Steel*, 301 U.S. at 32. The record showed that Jones & Laughlin Steel was the fourth largest steel producer in the country with nineteen subsidiaries and integrated operations throughout the nation that included production as well as transportation and sale of products in interstate commerce. *Id.* at 25-26. In counterpoint, however, was the fact that the discharged employees worked only in the local manufacturing plant and were not involved in transporting or selling the product in interstate commerce. *Id.* at 40. According to this Court, this latter fact was not determinative. *Id.* Rather, the case turned on how the stoppage of Jones & Laughlin Steel's manufacturing operations by industrial strife—which the National Labor Relations Act was designed to prevent—would affect interstate commerce. *Id.* at 41.

In considering the matter, this Court relied on what it called the fundamental principle "that the power to regulate commerce is the power to enact 'all appropriate legislation' for its 'protection and advancement.' " *Id.* at 36-37 (citations omitted). "That power is plenary," this Court said, "and may be exerted to protect interstate commerce 'no matter what the

source of the dangers which threaten it.' " *Id.* at 37 (citation omitted). This Court said further:

> Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

Id.

This statement describes that category of Commerce Clause enactments that substantially affects interstate commerce. As with similar statements of the "substantial effects" category of Commerce Clause regulation, this Court was focused on finding a "close and substantial" impact on interstate commerce and determining whether the regulation was necessary "to protect that commerce."

In view of Jones & Laughlin Steel's far-flung activities, this Court found the stoppage of its intrastate manufacturing operations by industrial strife would have a serious effect on interstate commerce that is direct, immediate, and even catastrophic.[3] *Id.* at 41. When an industry on a national scale

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[3] Jones & Laughlin produced steel, steel ingots, finished rolled products, coke and pig-iron at two Pennsylvania plants, Aliquippa and Pittsburgh. [*In re Jones & Laughlin Steel Corp.*, 1 N.L.R.B.] at 504-05. It operated as a vertically integrated conglomerate owning ore, coal and limestone mines as well as lake and river boats and facilities and railroad track, terminals and cars. *Id.* at 505. The mines were located in Michigan, Minnesota, Pennsylvania, and West Virginia. *Id.* The company maintained warehouses, steel-fabricating shops, distribution centers, stores and yards throughout the Midwestern and Northeastern United States. *Id.* at 506. Although Jones & Laughlin manufactured its products within

(continued...)

makes its relation to interstate commerce a "dominant factor," this Court concluded, Congress may regulate intrastate activity—in this case labor relations—"to protect interstate commerce from the paralyzing consequences of industrial war." *Id.*

In *United States v. Darby*, this Court upheld the Fair Labor Standards Act, which prohibited the shipment, in interstate commerce, of goods that were produced without compliance with the Act's standards for employee wages and hours. *Darby*, 312 U.S. at 109. This Court determined interstate commerce is injured when it is used as an instrument of unfair competition "in the distribution of goods produced under substandard labor conditions." *Id.* at 115. This case extended the reach of the Commerce Clause to local manufacturing operations—an intrastate activity—that this Court had previously determined were beyond the scope of congressional authority. *Id.* at 115-17. This Court explained the scope of that authority in these terms:

> The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Id. at 118.

Once again, this Court's inquiry was directed at both the significance of the regulated activities' effect on interstate commerce and the legitimacy of the end, or purpose, of the regulation (i.e., whether Congress was exercising control over interstate commerce).

In a further extension of the "substantial effects" category of Commerce Clause enactments, this Court upheld the economic regulation of local wheat production in *Wickard v. Filburn* under the Agricultural Adjustment Act of 1938. Among other things, that Act involved a national regulatory scheme to control the price of wheat by regulating the volume of wheat on the market. "Acreage limitations were the Act's primary tool for controlling the supply of federally subsidized crops." Jim Chen, *Filburn's Legacy*, 52 Emory L.J. 1719, 1734 (2003). Before the 1941 planting season, it was clear that the low prices for wheat were the result of excessive supply. *Id.* "Only stiffer penalties on excess production could prevent already overflowing stocks from surpassing the all-time high, which had been reached in 1940." *Id.*

Under the Act, the Secretary of Agriculture was directed "to proclaim a national acreage allotment for each year's wheat crop." *Id.* at 1735. Because of a growing fear of a glut in the market and the associated price crash, allotments were set and penalties raised for excess crops during the 1941 growing season. *Id.* Roscoe Filburn was subject to this regulation.

Filburn was a lifelong farmer who raised dairy cattle and poultry. He also grew wheat which he sold, fed to his cattle and poultry, and used for household consumption. *Id.* at 1734. Additionally, Filburn ran a commercial business selling milk and eggs to about 75 customers a day from the cattle and

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[3] (...continued)
Pennsylvania, seventy-five percent were shipped out of the state. *Id.* In 1934, the company employed a total of 523,000 men. *Id.* at 507.

Arthur B. Mark III, *United States v. Morrison, The Commerce Clause and the Substantial Effects Test: No Substantial Limit on Federal Power*, 34 Creighton L. Rev. 675, 711 n.375 (2001) (citing *In re Jones & Laughlin Steel Corp.*, 1 N.L.R.B. at 504-07).

poultry he fed with the wheat. *Id.* Filburn's allotment was 11.1 acres, but he planted 23 acres instead. The extra acreage yielded 239 bushels of wheat in excess of Filburn's allotment. Filburn was, therefore, fined for the excess, which he subsequently challenged in federal court.

On review, this Court found that home-grown wheat competes with wheat in interstate commerce either by entering the market or, if consumed by the grower, reducing the purchase of wheat in the market. *Wickard*, 317 U.S. at 128. And while the grower's "own contribution to the demand for wheat may be trivial by itself," this Court held that the aggregate economic effect of "others similarly situated, is far from trivial" and can be regulated. *Id.* at 127-28.

By amassing trivial effects of similar activity to find a "substantial effect" on interstate commerce, *Wickard* pushed the very limits of Congress' Commerce Clause authority. Never had this Court so liberally construed or so broadly applied the commerce power.

Together, *Jones & Laughlin Steel*, *Darby*, and *Wickard* ushered in a new era of expanding federal regulation of intrastate activity that seemed to recognize no limit on congressional authority under the Commerce Clause. *See* Mark, *supra* (arguing that aggregation under the substantial effects standard provides no meaningful stopping point to the reach of the commerce power). The rationale of these cases enhanced federal control to the seeming permanent detriment of the constitutional principle of limited government. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1451-52 (1987). Recently, however, this Court has held that the principle of a limited federal government, which preserves to the states control over most intrastate activity, in particular violent crime, is a vital consideration in determining the extent of federal power.

A. *Lopez* Announced That the Substantial Effects Standard Bars Federal Regulation of Noncommercial or Noneconomic Intrastate Crime

In *Lopez*, the Court held the Gun Free School Zones Act of 1990 unconstitutional, as exceeding Congress' power to regulate commerce as granted by the Constitution. *Lopez*, 514 U.S. at 551, 561. The Gun Free School Zones Act provided: "It shall be unlawful for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." Pub. L. No. 101-647, § 1702 (codified as 18 U.S.C. § 922(q)(1)(A) (1988 & Supp. V 2004)). A "school zone" was defined as on the grounds of or being within 1,000 feet of a public, private, or parochial school providing elementary or secondary education. Pub. L. No. 101-647, § 1702 (codified as 18 U.S.C. § 921(a)(25)-(26) (1988 & Supp. V 2004)).

The government prosecuted Alfonso Lopez, Jr., under the Gun Free School Zones Act for carrying an unloaded .38 caliber handgun and bullets to his high school in San Antonio, Texas. *Lopez*, 514 U.S. at 551. Passing upon the question of whether Congress exceeded its power under the Commerce Clause in criminalizing gun possession on the grounds of or within 1000 feet of schools, this Court discussed at length its Commerce Clause jurisprudence from the founding era forward, concluding under the commerce power, Congress may regulate three categories of activity: (1) use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce; and (3) activities having a substantial relation to interstate commerce. *Id.* at 552-59.

The Court concluded the Gun Free School Zones Act could only be sustained, if at all, under Congress' power to regulate intrastate economic activities substantially affecting interstate commerce. *Id.* at 559. Discussing the nature of the

"substantially affects" test, this Court concluded: "Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* at 560. Specifically regarding the Gun Free School Zones Act, the Court held the statute could not "be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561. Simply, "section 922(q) [was] a criminal statute that by its terms [had] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* Regulating gun possession in a school was not part of "a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* Thus, this Court held that Congress could not rely on the aggregate effects on interstate commerce of intrastate, noneconomic conduct to support federal regulation under the Commerce Clause. *Id.*

Further, this Court rejected the government's attempt to "pile inference upon inference" in order to show that gun possession in schools could lead to a "substantial effect" on interstate commerce.[4] *Id.* at 564-68. Such an argument, this Court found, would mean Congress could regulate all violent crime and all activities leading to violent crime, thus giving Congress a general police power under the Commerce Clause. *Id.* at 564, 567-68. However, the Constitution proscribes such

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[4] The government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped education process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have concluded that § 922(q) substantially affects interstate commerce.

Lopez, 514 U.S. at 564.

a result, only giving Congress limited power to regulate truly national issues, reserving the remainder to the states or to the people. *Id.* at 552-53, 568; *see* U.S. Const. art. I, §§ 8 & 9; amend. X.

B. *Morrison* Affirmed and Extended *Lopez*, Declaring That Intrastate Acts of Violence Against Persons Falls Outside Congress' Power to Regulate Interstate Commerce Under the Commerce Clause

In *Morrison*, this Court, relying on *Lopez*, invalidated the Violence Against Women Act, which purported to give victims of violent crimes against their person or property, committed "because of gender," a federal civil rights cause of action. 42 U.S.C. § 13981. The case arose out of Christy Brzonkala's rape, which she alleged violated section 13981. *Morrison*, 529 U.S. at 603-04. Like the Gun Free School Zones Act, the federal government sought to sustain section 13981 as "a regulation of activity that substantially affects interstate commerce." *Id.* at 609. This Court explained that *Lopez* set forth a four-part inquiry for determining the constitutionality of the VAWA, which relied on the Commerce Clause: (1) whether the regulated activity is economic in nature; (2) whether the statute contains an express jurisdictional element; (3) express legislative findings that the regulated activity substantially affects interstate commerce; and (4) the degree of attenuation between the regulated activity and interstate commerce. *Morrison*, 529 U.S. at 607-13.

Applying the four factors, this Court found the first factor, the noneconomic, criminal nature of the activity, central to the inquiry regarding whether Congress could regulate such activity under the Commerce Clause. *Id.* at 610. "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Id.* at 613. Therefore, Congress could not aggregate the effects of this noneconomic activity to sustain regulating it

under the Commerce Clause. *Id.* Further, section 13981 contained no jurisdictional element and Congress' findings with respect to how gender-motivated crimes of violence substantially affect interstate commerce were rejected because they relied on the same kind of inferential reasoning rejected as unworkable under *Lopez*. *Morrison*, 529 U.S. at 613-16. This Court found the effects on interstate commerce cited by Congress—deterring victims from traveling; from engaging in employment in interstate business; increasing medical costs; diminishing national productivity—too attenuated from crimes of violence against women, such as rape, stressing that

> [i]f accepted, [the government's] reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

Id. at 615. Thus, intrastate acts of violence against all persons or property falls outside the power granted to Congress to regulate "commerce . . . among the several states." *Id.* at 607; U.S. Const. art. I, § 8, cl. 3.

C. *Raich* Does Nothing to Undermine This Court's Holdings in *Lopez* and *Morrison* That Congress' Commerce Power Does Not Extend to Intrastate Acts of Violence

In *Raich*, 125 S. Ct. 2195, this Court decided that the federal government could constitutionally prosecute those who, wholly intrastate, grew and possessed marijuana for medicinal use. *Raich*, 125 S. Ct. at 2201. The Court's rationale was based on the fact that the federal Controlled Substance Act was

a "comprehensive framework for regulating the production, distribution, and possession of . . . controlled substances." *Id.* at 2210. This scheme aimed to regulate which controlled substances could be used for medical purposes. *Id.* at 2211. Marijuana, for whatever use, is a fungible product and would, like the wheat grown in *Wickard*, overhang the market and undercut the regulation of the market for medical substances established by the Controlled Substances Act. *Raich*, 125 S. Ct. at 2211-15. *See Wickard*, 317 U.S. at 128 (noting home-grown and consumed wheat "overhangs the market and if induced by rising prices tends to flow into the market and check price increases"). Given the comprehensive nature of the Controlled Substances Act's regulation of interstate markets in drugs, including marijuana, the Court found regulation of the intrastate growing and possession of medical marijuana appropriate under the aggregation principle. *Raich*, 125 S. Ct. at 2211-15.

The key to federal power in *Raich* was the fact that the Controlled Substances Act was a comprehensive scheme regulating an interstate market in narcotics. *Id.* at 2211-12. The Court explained the Controlled Substances Act regulates drugs that have useful and legitimate medical purposes and imposes controls on the entire market—from manufacturers, to physicians, to pharmacies. *Id.* The Court reasoned that within that unified scheme of regulation of a very specific market, it was necessary to regulate marijuana grown, wholly intrastate, for medical use because failure to do so could seriously undermine the regulation of the entire interstate narcotics market. *Id.* at 2211-15. Implicit in the Court's holding is the fact that if states could exempt from the federal market regulatory scheme one banned narcotic, they could do so with others, further undermining federal control. *Id.* at 2213.

That Congress had created a distinctive and comprehensive scheme for regulating a market in drugs—from production to distribution—was the distinguishing feature that brought the activity at issue in *Raich* within the realm of

commercial or economic activity. *Id.* at 2209-11. "Unlike those activities at issue in *Lopez* and *Morrison*, the activities regulated by the Controlled Substances Act are quintessentially economic." *Raich*, 545 U.S. at 2211. "The Controlled Substances Act is a statute that regulates the production, distribution and consumption of commodities for which there is an established, and lucrative interstate market." *Id.* Prohibiting a particular commodity from entering that market was therefore a regulation of interstate commerce. *Id.* Because the Controlled Substances Act aimed at regulating the production or distribution of a fungible commodity that was sold in an interstate market, the aggregation doctrine applied to allow regulation of marijuana grown and distributed wholly intrastate for medical use. *Id.* at 2215. *Raich*, therefore, does not undermine *Lopez* and *Morrison* because neither *Lopez* nor *Morrison* considered statutes explicitly aimed at regulating an interstate market in a particular commodity.

In fact, *Raich* confirms what *Lopez* and *Morrison* held with respect to Congress' power and this Court's Commerce Clause jurisprudence: that Congress' power under the Commerce clause, however broad, only reaches regulation of interstate commerce. "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone [and intrastate violent crime] does not." *Lopez*, 514 U.S. at 560; *Morrison*, 529 U.S. at 609. *Raich* could be substituted for *Wickard* in the preceding quote, and the principle established by *Lopez* and *Morrison* remains: Congress cannot regulate noncommercial or noneconomic conduct under the Commerce Clause. Therefore, the holdings and rationales of *Lopez* and *Morrison*—that the federal commerce power cannot constitutionally control violence against persons or property—should inform the Court's interpretation of the Hobbs Act in this case.

II

"FIRST PRINCIPLES" DICTATE STRICT LIMITS TO FEDERAL POWER UNDER THE COMMERCE CLAUSE

This Court's Commerce Clause jurisprudence recognizes two "first principles" as a constraint on federal constitutional power. First, is that the "Constitution creates a Federal Government of enumerated powers." *Lopez*, 514 U.S. at 552. " 'The powers delegated by the . . . Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.' " *Id.* (quoting The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). Second, is that " 'a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.' " *Lopez*, 514 U.S. at 552 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). "Were the federal government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring). *See Gregory*, 501 U.S. at 459 ("In the tension between federal and state power lies the promise of liberty.").

A. The Principle of Enumerated Limited Powers Requires That Regulation of Noncommercial, Intrastate Activity Remain the Province of State Government

This Court has emphasized the importance of respecting and enforcing the limited powers granted to Congress under the Constitution. In *Marbury*, 5 U.S. at 176, this Court declared:

> The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed.

This principle of limited federal power has informed many of this Court's important decisions defining the limits of Congress' power under the Commerce Clause.

The seminal case of *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), in considering the scope of the power granted to Congress under the Commerce Clause, made it clear that the power was limited to regulating interstate commerce:

> It is not intended to say that [the Commerce Clause] comprehend[s] that *commerce*, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary . . . . The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal *commerce* of a State.

Gibbons, 22 U.S. at 194-95 (emphasis added). What necessarily follows from this proposition is that the Commerce Clause does not allow Congress to reach noncommercial or noneconomic activities. Indeed if Congress cannot reach the "exclusively internal commerce of a state" under the Commerce

Clause, it cannot reach beyond internal *commerce* altogether to govern intrastate, *noncommercial* activities.

This Court's Commerce Clause jurisprudence from *Gibbons* forward, detailed in *Lopez*, found that "even these modern-era precedents [*Jones & Laughlin Steel*, *Darby*, and *Wickard*] which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits." *Lopez*, 514 U.S. at 556-57. That the limit is governance of interstate commerce is evident from cases like *Jones & Laughlin Steel*, *Darby*, and *Wickard*.

In *Jones & Laughlin Steel*, this Court found that Congress may regulate intrastate activities the control of which is "essential or appropriate to protect [interstate] commerce from burdens and obstructions." *Jones & Laughlin Steel*, 301 U.S. at 37. Likewise, in *Darby*, this Court held that Congress can regulate intrastate activities for the "attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *Darby*, 312 U.S. at 118. And, in *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942), which was decided the same year as *Wickard*, this Court held that the power of Congress to regulate commerce "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power." *Wrightwood Dairy*, 315 U.S. at 119.

These precedents all support one central theme: that the power to regulate commerce among the several states is and was limited to the ability to enact "all appropriate legislation" for "its protection and advancement." *Jones & Laughlin Steel*, 301 U.S. at 37 (citation omitted). Statutes that "neither regulate[] a commercial activity nor contain[] a requirement that [the regulated activity] be connected in any way to interstate commerce . . . . exceed[] the authority of Congress 'to regulate Commerce . . . among the several States.'" *Lopez*, 514 U.S. at 551 (citation omitted). Indeed, *Morrison* proscribed the

federal government's attempt to convert the attenuated effects of violence against women on interstate commerce to substantial effects on interstate commerce:

> Congress found that gender-motivated violence affects interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; . . . by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products. H.R. Conf. Rep. No. 103-711, at 385, U.S. Code Cong. & Admin. News 1994, pp. 1803, 1853 . . . . The reasoning that [the government] advance[s] seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, [the government's] reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption.

Morrison, 529 U.S. at 615. "Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part." *Id.* Thus, the bright line rule announced in *Morrison*: Congress may not constitutionally regulate intrastate activity—such as violence against persons or property—that is noneconomic or noncommercial in nature. *Id.* at 613, 617.

This rule holds even where a statute premised on the power to regulate interstate commerce contains a "jurisdictional element." For example, in *Jones v. United States*, 529 U.S. 848, 850 (2000), the Court considered a federal statute, 18 U.S.C. § 844(i), that made it a crime to damage or destroy "by means of fire or an explosive, any . . . property used in interstate or foreign commerce." Dewey Jones was convicted under this statute for burning down a house in Fort Wayne, Indiana. *Jones*, 529 U.S. at 850. In rejecting the Government's arguments that prosecuting Jones was protecting interstate commerce because the house was collateral for a mortgage, was insured by an out-of-state insurance company, and received utilities from out-of-state companies, this Court held "section 844(i) is not soundly read to make virtually every arson in the country a federal offense. We hold that the provision covers only property currently used in [interstate] commerce or in an activity affecting [interstate] commerce." *Id.* at 859. In so holding, the Court affirmed that acts of Congress passed pursuant to the Commerce Clause must truly govern interstate commerce and cannot be converted into sweeping federal anti-crime laws via attenuated effects. *Id.* at 857.

Jones's holding fits perfectly with *Morrison*'s, which condemned the federal government's attempt to regulate violence against women under the guise of a statute that purportedly was aimed at regulating interstate commerce.

B. The Principle of Federalism Leaves Regulation of Noncommercial Intrastate Activity to State Governments

With respect to the scope of the commerce power, this Court has found it

> must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our

> complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

Jones & Laughlin Steel, 301 U.S. at 37. As this Court reasoned in *Morrison* and *Lopez*, any noneconomic or noncommercial intrastate activity can be said to "affect" "national productivity" and thus interstate commerce through a chain of inferential reasoning. *Lopez*, 514 U.S. at 565-68; *Morrison*, 529 U.S. at 612-17. However, this Court rejected such broad power under the Commerce Clause, finding that it would undermine the principle of dual sovereignty to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. Thus, our system of dual government left the regulation of noncommercial intrastate activities to the States.

"The powers reserved to the several States . . . extend to all objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people, and the internal order, improvement and prosperity of the State." The Federalist No. 45, at 293. *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."). Violence against persons or their property is within the core of this reserved power. *Morrison*, 529 U.S. at 617. Indeed, the states have vigorously used their police power to prosecute noncommercial, intrastate acts of violence like those at issue in this case.

One case in point is Michael Griffin, who murdered Dr. David Gunn outside an abortion clinic in Pensacola, Florida. *Activist Gets Life for Killing Abortion Doctor*, L.A. Times, Mar. 6, 1994, at A1. The State of Florida convicted Michael Griffin of first degree murder for the death of Dr.

Gunn. *Abortion Foe Guilty of Murder*, Newsday, Mar. 6, 1994. He was sentenced to life in prison. *Activist Gets Life for Killing Abortion Doctor*, *supra*.

Florida also convicted and put to death Paul Hill, who murdered Dr. John Britton and his security escort in 1994. Henry Chu & Mike Clary, *Doctor, Volunteer Slain Outside Abortion Clinic*, L.A. Times, July 30, 1994; Paul Pinkham et al., *Abortion Doctor's Killer Executed by Injection*, The Florida Times-Union, Sept. 4, 2003, at A1.

The State of New York prosecuted and convicted James Kopp of the intentional murder of Dr. Bernard Slepian, a New York abortion doctor. Michael Beebe, *Kopp is Convicted of Murder*, Buffalo News, Mar. 19, 2003, at A1.

The State of Massachusetts convicted John Salvi on two-counts of first degree murder and five counts of assault with intent to murder; Salvi was sentenced to life in prison without the possibility of parole. Michael Tighe, *Salvi Convicted in Abortion Clinic Murders*, Seattle Post-Intelligencer, Mar. 19, 1996, at A3.

Overall, from 1989-1994, approximately 70,000 arrests by state and local law enforcement officers were made in relation to protests outside abortion clinics. H.R. Rep. No. 103-306, at 24 (1994) (dissenting views), *reprinted in* 1994 U.S.C.C.A.N. 699, 719. This history of state prosecutions shows that even where a certain type of violence is "national" in scope, it is the role of state governments to suppress such crime and vindicate the interests of victims. Not only that, it is logical that states regulate violence against persons or property because each instance of such violence is intrastate and impacts intrastate interests. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1137 (1995). As such, this Court has "always [] rejected readings of the Commerce Clause and the scope of

federal power that would permit Congress to exercise a police power." *Lopez*, 514 U.S. at 584.

CONCLUSION

The Seventh Circuit construed the Hobbs Act to reach wholly intrastate acts of violence against persons or property. Because the Hobbs Act is an exercise of Congress' power under the Commerce Clause, this interpretation raises serious questions concerning the scope of federal power under the Commerce Clause. In considering the Seventh Circuit's interpretation of the Hobbs Act, this Court should adhere to "first principles" as it did in *Lopez* and *Morrison*: that Congress' powers are "few and defined" in order to prevent converting "congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567; *Morrison*, 529 U.S. at 517.

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